Date: 20090212

Docket: T-1148-01

Citation: 2009 FC 150

Ottawa, Ontario, February 12, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

UNIVERSAL SALES, LIMITED
ATLANTIC TOWING LIMITED
J.D. IRVING, LIMITED
IRVING OIL COMPANY, LIMITED
IRVING OIL LIMITED

Plaintiffs

and

EDINBURGH ASSURANCE CO. LTD.
ORION INSURANCE CO. LTD
BRITISH LAW INSURANCE CO. LTD.
ENGLISH & AMERICAN INS. CO. LTD.
ECONOMIC INSURANCE CO. LTD.
ANDREW WEIR INS. CO. LTD.
INSURANCE CO. OF NORTH AMERICA
LONDON & EDINBURGH GENERAL INS. CO. LTD.
OCEAN MARINE INS. CO. LTD.
ROYAL EXCHANGE ASSURANCE
SUN INSURANCE OFFICER LTD.
SPHERE INSURANCE CO. LTD.
DRAKE INSURANCE CO. LTD.
EAGLE STAR INSURANCE CO. LTD.
STEPHEN ROY MERRITT, AS REPRESENTATIVE OF UNDERWRITERS SUBSCRIBING TO LLOYD'S POLICY NO. 614/B94656-A/1582

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

MOTION

[1] This motion by the Plaintiffs is an appeal from an order of Prothonotary Lafrenière dated August 6, 2008. The Plaintiffs are seeking to have that order set aside and/or varied and an order from the Court:

a. Declaring that the Defendants have waived privilege over all documents relating to the issue of coverage that were prepared before July 13, 2000;
b. Requiring the Defendants to produce all documents not previously produced relating to the issue of coverage that were prepared before July 13, 2000;
c. Requiring the Defendants to answer certain questions that were refused during the written examination for discovery of Mr. Roland Birch;
d. Requiring a representative of the Defendants to attend to be examined for discovery to answer any of the refusals ordered to be answered, and any proper questions arising therefrom, and to answer any proper questions arising from any additional documents ordered to be produced as a result of the waiver of privilege;
e. Costs of the motion.

[2] The Plaintiffs say that Prothonotary Lafrenière was both incorrect and clearly wrong in that he misapprehended the facts surrounding the Defendants' partial disclosure of their coverage advice and the production of the Côté Letter, and misapplied principles of solicitor-client privilege and

waiver. In addition, the Plaintiffs say that the issues of consent and prejudice raised in this motion are vital to the case because they are directly relevant to the soundness of the Defendant's defence.

BACKGROUND

[3] These proceedings involve an insurance claim dispute between the Plaintiffs (the insureds) and the Defendants (the insurers) over coverage for certain expenses incurred by the Plaintiffs related to the sinking and raising of the Irvine Whale. The ship sank in the Gulf of St. Lawrence on September 7, 1970 with a cargo of fuel oil and was raised by the Federal Government on July 31, 1996.

[4] The Federal Government took legal action against the Plaintiffs that concluded in a settlement on or about July 13, 2000. As part of the settlement the Plaintiffs agreed to pay the government $5 million dollars without admission of liability.

[5] The Plaintiffs then sought indemnity from the Defendants who have denied the insurance claim. As a consequence, the Plaintiffs commenced these proceedings in June 2007 for indemnity under the relevant insurance policies.

[6] The Plaintiffs take the position in this motion that the Defendants have denied coverage in their Statement of Defence on the basis, *inter alia*, that the Plaintiffs did not seek the consent of the Defendants before agreeing to the settlement with the Federal Government.

[7] The Plaintiffs say that, under the relevant insurance policies, consent is only required where action is taken to the prejudice of the Defendants and that the Defendants were not prejudiced by the settlement.

[8] The Plaintiffs take the position that if the Defendants held the view prior to the government settlement that the Plaintiffs were not covered, then this would counter any alleged lack of consent and prejudice. In other words, the Plaintiffs say that if the Defendants had made a determination prior to the settlement with the government (July 31, 2000) that there was no coverage, then the Plaintiffs' act of entering into the settlement could not have been to the Defendants prejudice, because the Defendants would not have behaved any differently if their consent had been sought.

[9] This motion deals with the Defendants' refusal to produce documents or answer discovery questions related to when they determined there was no coverage. The Defendants are claiming solicitor-client privilege.

[10] The Plaintiffs say that the issue of when the Defendants decided there was no coverage is a factual question and is not even protected by solicitor-client privilege. In addition, the Plaintiffs say they may be hamstrung at the trial if they do not have discovery of information and documents that will allow them to mount an argument at trial that the Defendants had concluded prior to July 31, 2000 that there was no coverage under the relevant insurance policies.

[11] The Plaintiffs allege that the defendants have raised a defence that the Plaintiffs cannot counter and which the Court cannot evaluate without knowing when the Defendants came to hold the view that the Plaintiffs would not be covered, and without reviewing the legal advice provided to the Defendants concerning coverage.

PROTHONOTARY'S DECISION

[12] In his decision of August 6, 2008, Prothonotary Lafrenière dealt with the coverage and privilege issue as follows:

> At paragraph 21 of their Statement of Defence, the Defendants have plead that: "(t)he settlement entered into between the Plaintiffs and the Government of Canada was entered into without the knowledge and consent of the Pleading Defendant". The Plaintiffs submit that the Defendants have raised a defence that they cannot counter and that the Court cannot evaluate without reviewing the advice counsel provided to the Defendants about coverage. The Plaintiffs also submit that the Defendants have waived privilege by producing a document which contains solicitor-client legal advice.
>
> On the evidence before me, I am not satisfied that the Defendants have waived solicitor-client privilege, either explicitly or implicitly, to documents that relate to the issue of coverage that were prepared before July 13, 2000. To begin with, paragraph 21 of the Statement of Defence cannot be viewed as a waiver of privilege. The mere fact that the Plaintiffs may be hamstrung in responding to the allegation does not warrant breaching solicitor-client privilege.
>
> Moreover, the Defendants quite properly disclosed the letter dated January 28, 1999 signed by Pierre G. Côté (Côté Letter) because privilege had been waived when it was provided to third parties. The fact the Côté Letter refers to reports dealing with insurance coverage issues dating back to July 28, 1996 and September 10, 1997 does not constitute waiver of those reports or the legal advice contained therein. It bears noting that the Côté Letter does not contain any kind

> of detailed information respecting the legal position of his client, and more particularly the legal advice as given to his client in the past. In the circumstances, the concern of "completion and fairness" as referred to By Justice O'Driscoll in *Stevenson v. Reimer*, [1993] O.J. No. 2800, is of no moment. On the facts before me, I find that the disclosure of the Côté Letter did not operate to waive solicitor-client privilege in the remaining undisclosed reports or the legal advice itself.

STANDARD OF REVIEW

[13] The Plaintiffs say that if the Prothonotary's conclusion on solicitor-client privilege is one of law then the standard of review ought to be correctness. However, even if the decision was discretionary, so that the principles in *Merck & Co. v. Apotex Inc.*, 2003 FCA 488, 30 C.P.R. (4th) 40, at paragraphs 17-19, and *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.) at page 19, apply, the result is the same because Prothonotary Lafrenière was both incorrect and clearly wrong in that he misapprehended the facts surrounding the Defendants' partial disclosure of their coverage advice and the production of the Côté Letter, and he also misapplied the principles of solicitor-client privilege and waiver.

[14] The Plaintiffs also say that the issues of consent and prejudice are vital to the final issue or disposition of this case because they are directly relevant to the soundness of the Defendants' defence on the coverage issue.

[15] In reviewing Prothonotary Lafrenière's decision on the point at issue, it seems to me that it is based upon findings of fact and his view of the principles of solicitor-client privilege applicable to the facts as found.

[16] In my view then, I am required to consider, within the usual principles set forth in *Merck* and *Aqua-Gem* whether the order is clearly wrong in the sense that Prothonotary Lafrenière's discretion was based upon a wrong principle or upon a misapprehension of the facts.

[17] I am not convinced that I am dealing with a question vital to the final issue of the case or with a situation in which the standard ought to be correctness. However, even if I were to apply a standard of correctness, my conclusions would be the same.

ANALYSIS

[18] The Plaintiffs say that the Defendants have chosen to make an allegation in their Statement of Defence that puts privileged material directly at issue and have thereby, by implication, waived any privilege in that material.

[19] My review of the record suggests to me that the Defendants have not put at issue their position on coverage prior to receipt of the Plaintiffs' claim, and they certainly do not put at issue advice received by counsel on coverage prior to the claim.

[20] As Prothonotary Lafrenière pointed out, paragraph 21 of the Statement of Defence cannot be viewed as a waiver of privilege.

[21] All that paragraph 21 of the Statement of Defence pleads is that the government settlement is not "based on any established liability" under the relevant policy and it was entered into "without the knowledge and consent" of the Defendants so that, for both reasons, "the said settlement is not binding on the Pleading Defendants."

[22] Paragraph 21 alleges that the government settlement cannot be binding on the Defendants because there is no liability for it under the policy and the Defendants never consented to it.

[23] I do not see anything in this paragraph which puts in issue the Defendants' state of mind before the claim was made or that even raises the issue of prejudice as a result of a failure to obtain prior consent. The Defendants are simply saying that there is no coverage for the government settlement because it is not based upon any established liability and they did not consent to it.

[24] The Plaintiffs are seeking to expand the import of paragraph 21 by connecting it to their own interpretation of clause 7 of the Excess Insurance Policies, which states:

> The Assured hereby warrants and agrees that it will in no way consent to any act or agreement which shall admit liability in any matter connected with this insurance to the prejudice of these Assurers without the consent of the Assurers in writing.

[25] The Plaintiffs appear to be suggesting that under this clause "consent is only required where an action is taken to the prejudice of the Defendants" and that the "import of the Defendants' defence is that the Defendants were prejudiced by the Government Settlement, allegedly entered into without their consent."

[26] In their Reply the Plaintiffs say, at paragraph 6, "In any event, the Government Claim settlement did not in any respect prejudice the interests of the Defendants."

[27] It would appear from this that the Plaintiffs would like to mount a particular argument that consent was not required for the Government Settlement under clause 21 and that the Defendants are alleging prejudice as a result of failure to obtain consent by the Plaintiffs.

[28] But this is an argument put forward by the Plaintiffs. It is not, as the Plaintiffs allege, the "import" of the Statement of Defence, and, in my view, the Defendants have not put their pre-claim state of mind on coverage at issue. The Plaintiffs are attempting to make it an issue but, as the Defendants point out, the Statement of Defence "does not rely upon or even mention coverage positions held by the Pleading Defendants prior to receipt of the Plaintiffs' claim, nor does it refer to advice received from counsel with regard to coverage." All the Plaintiffs have done in the Statement of Defence is to assert that the amounts claimed by the Plaintiffs are not payable under the terms of the relevant policies.

[29] So I think I have to agree with the Defendants that the "question of potential coverage positions held by the Pleading Defendants prior to any claims being actually submitted to them is entirely irrelevant and is in no way raised in the Pleading Defendants pleadings." The consent and prejudice issues, and their relationship to pre-claim positions on coverage have been put at issue by the Plaintiffs based upon their interpretation of clause 7 of the Excess Insurance Policies. However, be that as it may, I cannot accept that the Defendants have put at issue their pre-claim state of mind regarding coverage in such a way that would justify a waiver of privilege.

[30] This also means that I must reject the Plaintiffs' arguments that the Defendants have somehow raised a defence that the Plaintiffs cannot counter and the Court cannot evaluate without knowing when the Defendants came to hold the view that the Plaintiffs would not be covered by the Excess Insurance Policies and without reviewing the legal advice provided to the Defendants on the subject matter of coverage.

[31] In my view, Prothonotary Lafrenière was entirely correct to conclude that "paragraph 21 of the Statement of Defence cannot be viewed as a waiver of privilege."

[32] If the Plaintiffs feel "hamstrung" then, in my view, this is because they are seeking to breach privilege in search of evidence regarding the Defendants' position on pre-claim coverage, an issue which they have raised to support their interpretation of clause 7 of the Excess Insurance Policies. They are not "hamstrung" as a result of anything the Defendants have put in issue.

[33] The difficulties, if any, are a result of what the Plaintiffs claim is the "import" of the Statement of Defence. I can find no such import but, given the particular interpretation adopted by the Plaintiffs, I think that Prothonotary Lafrenière was correct to conclude that the "mere fact that the Plaintiffs may be hamstrung in responding to the allegation does not warrant breaching solicitor-client privilege." If it did, then an idiosyncratic interpretation of an allegation contained in a pleading could be used to allege being "hamstrung" and justify a breach of privilege. I do not see how, by pointing out in paragraph 21 of the Statement of Defence that the "settlement entered into between the Plaintiffs and the Government of Canada was entered into without the knowledge and consent of the Pleading Defendants," the Defendants can be said to have placed in issue their pre-claim state of mind regarding coverage.

[34] In *Fraser v. Houston*, 2002 BCSC 1378 (Can.LII), the following summary of the authorities relating to solicitor-client privilege appears at paragraph 22:

> **22** The authorities relating to waiver of solicitor-client privilege set out the following principles:
>
> > 1. Solicitor-client privilege should be interfered with only to the extent necessary to achieve a just result: *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860.
> >
> > 2. Waiver of solicitor-client privilege may occur in the absence of an intention to waive, where fairness and consistency so require. Waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost: *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, [1983] B.C.J. No. 1499.

> 3. A party will waive the protection of solicitor-client privilege when it voluntarily injects into the proceeding the question of its state of mind, and, in doing so, uses as a reason for its conduct the legal advice that it has received: *Morrison* (*supra*).
>
> 4. To displace solicitor-client privilege there must be an affirmative allegation which puts the party's state of mind in issue: *Pax Management Ltd. v. C.I.B.C.* (1987), 14 B.C.L.R. (2d) 257 (B.C.C.A.).

[35] On the facts before me, there is no affirmative allegation by the Defendants that puts their state of mind regarding a pre-claim position on coverage at issue. Hence on this issue I cannot say that Prothonotary Lafrenière was clearly wrong in the sense of basing his decision upon a wrong principle or upon a misapprehension of the facts. In fact, I think his decision was correct on this issue.

[36] The Plaintiffs also say that the Defendants waived privilege over the coverage issue by disclosing the Côté Letter.

[37] As Prothonotary Lafrenière pointed out in his order, the Côté Letter was disclosed because privilege had been waived when the letter was provided to third parties.

[38] The Plaintiffs say the Côté Letter suggests that, by January 1999, the Defendants had reached the view that the settlement amount was not covered by the Excess Insurance Policies. They say it is not fair to require the Plaintiffs or the Court to assess whether the Settlement Agreement

prejudiced the Defendants in light of the Defendants' partial and contradictory disclosure relating to their instructions to counsel and their legal advice on the issue of coverage.

[39] I have already made it clear that, in my view, the Defendants have not put their pre-claim state of mind regarding coverage at issue and that the Plaintiffs are pursuing an argument of their own devising regarding consent and prejudice. The Plaintiffs' argument relating to the disclosure of the Côté Letter is based upon the allegation that the Defendants have raised the issue of their opinion on coverage, an argument I have rejected.

[40] The disclosure of the Côté Letter does not, in my view, demonstrate an intention to waive privilege over the coverage issue. The letter was disclosed because it had already been provided to a third party. There is neither express nor implied waiver on these facts.

[41] As the Affidavit of Ms. Marlene Kempthorne dated July 7, 2008 makes clear, initial attempts were made to resist disclosure of the letter based upon privilege. The letter was only disclosed when it was discovered it had previously been disclosed by insurers to third parties. So it is simply not accurate to allege, as the Plaintiffs do, that the Defendants have chosen to disclose and rely upon a portion of the story regarding coverage and the legal advice they received on coverage. As Prothonotary Lafrenière found, this is not a case of cherry picking.

[42] The case law relied upon by the Plaintiffs provides examples of where one party to a dispute first disclosed and then sought to rely upon portions of documents containing privileged information while withholding others.

[43] In the present case, the Côté Letter was disclosed in its entirety and the ripple effect that the Plaintiffs are seeking to support coverage arguments they want to raise should be resisted: *Letourneau v. Clearbrook Iron Works Ltd.* (2004), 36 C.P.R. (4th) 228 (Fed. Ct.).

[44] As regards the Plaintiffs' arguments for waiver over the letters referred to in the Côté Letter, they are once again premised on the assertion that the Plaintiffs are seeking to breach privilege because of the pre-claim coverage issue raised by the Defendants. I have found that position to be untenable.

[45] In effect, the Plaintiffs are seeking all advice provided to the Defendants on the issue of coverage and, at the very least, production of the actual letters referred to in the Côté Letter.

[46] Prothonotary Lafrenière made important findings of fact on this issue that have not, in my view, been shown to be misapprehensions:

> Moreover, the Defendants quite properly disclosed the letter dated January 28, 1999 signed by Pierre G. Côté (Côté Letter) because privilege had been waived when it was provided to third parties. The fact the Côté Letter refers to reports dealing with insurance coverage issues dating back to July 28, 1996 and September 10, 1997 does not constitute waiver of those reports or the legal advice contained therein. It bears noting that the Côté Letter does not contain any kind of detailed information respecting the legal position of his client, and

> more particularly the legal advice as given to his client in the past. In the circumstances, the concern of "completion and fairness" as referred to by Justice O'Driscoll in *Stevenson v. Reimer*, [1993] O.J. No. 2800, is of no moment. On the facts before me, I find that the disclosure of the Côté Letter did not operate to waive solicitor-client privilege in the remaining undisclosed reports or the legal advice itself.

[47] The Defendants have made it clear that they "do not intend to raise the privileged information in the context of these proceedings," and I have already made it clear that the pre-claim coverage issue is raised by the Plaintiffs. So I do not see how the Defendants can be said to have engaged in selective disclosure on these facts and, in my view, there is nothing "clearly wrong" with the Prothonotary's decision on these waiver issues. Once again, even if I review the matter *de novo*, it is my view that he was correct.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The Plaintiffs' motion is dismissed.
2. The Defendants shall have their costs of this motion payable forthwith within 30 days and in any event of the cause.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1148-01
STYLE OF CAUSE:	**UNIVERSAL SALES, LIMITED** **ATLANTIC TOWING LIMITED** **J.D. IRVING, LIMITED** **IRVING OIL COMPANY, LIMITED** **IRVING OIL LIMITED** **and** **EDINBURGH ASSURANCE CO. LTD.** **ORION INSURANCE CO. LTD** **BRITISH LAW INSURANCE CO. LTD.** **ENGLISH & AMERICAN INS. CO. LTD.** **ECONOMIC INSURANCE CO. LTD.** **ANDREW WEIR INS. CO. LTD.** **INSURANCE CO. OF NORTH AMERICA** **LONDON & EDINBURGH GENERAL INS. CO. LTD.** **OCEAN MARINE INS. CO. LTD.** **ROYAL EXCHANGE ASSURANCE** **SUN INSURANCE OFFICER LTD.** **SPHERE INSURANCE CO. LTD.** **DRAKE INSURANCE CO. LTD.** **EAGLE STAR INSURANCE CO. LTD.** **STEPHEN ROY MERRITT, AS REPRESENTATIVE OF UNDERWRITERS SUBSCRIBING TO LLOYD'S POLICY NO. 614/B94656-A/1582**
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	17-DEC-2008
REASONS FOR :	RUSSELL J.
DATED:	February 12, 2009

APPEARANCES:

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